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Supreme Court of the United States

OCTOBER TERM, 1943

No. 434

MORRIS U. SCHAPPES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

PETITIONER'S REPLY BRIEF

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INDEX

PAGE

POINT I—The *Boehm* case is neither controlling nor even persuasive of the issue raised in the petition 1

A. The application for writ of certiorari in the *Boehm* case 2

B. The factual situation in the *Boehm* case 3

C. The extent of the request in the *Boehm* case 5

POINT II—On the issue of falsity, the petitioner was completely deprived of the right to cross-examine the prosecution's witnesses concerning their prior contradictory statements 7

POINT III—The petition for a writ of certiorari should be granted 9

TABLE OF CASES

Boehm v. United States, 123 F. (2d) 791, cert. den. 315 U. S. 800 ..... 1, 2, 3, 4, 5

Comm. v. Gettigan, 252 Mass. 450 7

Comm. v. Goldberg, 212 Mass. 88 6

People v. Becker, 210 N. Y. 274 9

People v. Schainuck, 286 N. Y. 161 8

People v. Walsh, 262 N. Y. 140 6

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POINT I

The *Boehm* case is neither controlling nor even persuasive of the issue raised in the petition.

The respondent cites the case of *Boehm* v. *United States* (C. C. A. 8th, 1941), 123 F. (2d) 791, cert. den. (1942) 315 U. S. 800, as having adversely decided the question raised in the case at bar (Resp. Br., p. 13). It rests that assertion on the declaration of the Circuit Court that

> "Of course there is no constitutional provision, Rule of Procedure or statute which requires the government to produce along with its witnesses in criminal prosecutions, the statements the witnesses may have made on occasions other than on the trial" (p. 805).

The question presented in the petition, however, is *not* whether a defendant in a criminal proceeding has a constitutional or other right to the production of statements made by witnesses on other occasions. The quoted statement of the Circuit Court in the *Boehm* case, whether correct or not, has no application. The question here presented is simply whether, under the particular facts of the case at bar, petitioner was deprived of the constitutional right of cross-examination. That he was so deprived because he was denied access to contradictory statements is simply a circumstance. The argument is not that petitioner had a constitutional right to prior statements,—the argument is that he was denied the constitutional right of cross-examination through the circumstance that contradictory statements of the witnesses were not made available to him. The Circuit Court in the *Boehm* case did not determine any such question. In so far as it treated of it at all, it was emphatic that the trial court had erred in not having required the production of the statements demanded by defendant in that case (pp. 807-09). Surely, if there was "no constitutional provision, Rule of Procedure or statute" which required the production of such statements at any time or under any circumstances, it is inconceivable why the Circuit Court criticized the trial court's ruling as an error.

A. The application for writ of certiorari in the *Boehm* case.

An examination of the petition and supporting brief in the application to this Court for a writ of certiorari (315 U. S. 800) shows conclusively that the question raised in the petition at bar was neither raised nor discussed there. No mention is made in the petition of a denial of any right guaranteed by the Sixth Amendment which would be analogous to the constitutional right which petitioner here claims was violated. The sole constitutional question raised was that of a denial of a "fair trial". Since under the

rules of this Court no question is considered which is not specifically raised (Rule 38, subd. 2, of Supreme Court Rules), and since that case arose in the Federal Court, this Court could, of course, consider the question of a fair trial in the light of the entire case and not merely of a specific error. Hence, the denial of certiorari in the *Boehm* case is in no way controlling here.

B. The factual situation in the *Boehm* case.

The argument advanced in the present petition is that *the whole testimony against petitioner* on the issue of falsity was that of witnesses who admittedly told contradictory stories at prior interrogations. It is this fact which made so essential their subjection to proper cross-examination to test the credibility of their evidence. We reiterate that theirs was the sole testimony offered by the People on the issue of falsity. Respondent tries to claim that this testimony was corroborated, but all it could cull from the record to support such claim is summed up in a single sentence (Resp. Br., p. 3). And what it alleges is not supported by the record.

The witness, Francis Williamson, referred to could not have known if Canning was a member of the Communist Party since he himself was not a member. But he does not even testify that Canning told him he was a member. None of the published statements referred to are in evidence and these were not even mentioned in the case during the presentation of the People's evidence; they were used to question the petitioner during cross-examination and were adequately explained by him. So that in fact there was no independent evidence offered by the People to support the testimony of the three witnesses in any particular.

In the *Boehm* case there apparently was substantial evidence of defendant's guilt in corroboration of the witnesses' testimony. As stated by the Circuit Court (123 F. [2d] 791, 803):

> "These practices which continued over a period of nearly 10 years were established by numerous witnesses *who were corroborated by many documentary exhibits.*" (Italics supplied.)
>
> "The evidence of these transactions was furnished *not only by the testimony of numerous witnesses, but also by voluminous bank statements, bank deposits and checks* which Keller had used in effecting the rebates." (Italics supplied.)

It is further argued in the petition at bar that, since the witnesses had been questioned at length by the legislative committee after denying membership in the Communist Party, clearly they must have told stories completely at variance with what they testified to at the trial. However, since the petitioner had no way of knowing what they had been asked at the legislative hearing, he was perforce unable to cross-examine them about that testimony so that the jury could determine which testimony was true.

In the *Boehm* case it appears that the defendant there knew the nature of the prior testimony of the witnesses and was able to cross-examine them about it without having the testimony before him (123 F. [2d] 791, 807). The Government's brief on the application for the writ of certiorari asserts (p. 11):

> "In most instances they were employees of the company and subordinates of petitioner, or attorneys who had been employed at his direction (R. 377-386, 398, 399, 488-491). Almost without exception, they stated that they had perjured themselves at the instance and request of petitioner (R. 658-659, 817, 965-968), and made a practice of advising petitioner of their perjury (R. 382-392, 568-569, 808-809, 965-968). Consequently, petitioner's claim that he was prejudiced in his cross-examination of these witnesses because he was ignorant of 'the material details of the prior conflicting testimony' (Pet. 30-31) is palpably frivolous."

It is not claimed here that petitioner was concerned with the prior testimony of the witnesses against him,—that they

testified as they did at his direction or that he had any knowledge of the subject matter of such testimony.

C. The extent of the request in the *Boehm* case.

It is stressed by the Circuit Court (123 F. [2d] 791, 807) as well as by the Government in its brief in the *Boehm* case that the petitioner there had requested *all of the testimony* of the adverse witnesses before the Government agency. The point is made that this would have embarrassed other prosecutions contemplated by the agency to which such testimony also referred.

In the present case it was made clear by the trial court and acquiesced in by petitioner's counsel that only such testimony as was material to the pending case should be made available to petitioner (see Pet. Br., p. 4-5). The question of confidentiality is therefore hardly germane in this case, in spite of its having been magnified by respondent in its brief.

The limitation referred to in the use of the prior testimony adequately disposes of the argument contained in B-3 of Point I in respondent's brief. Since the witnesses had disclosed that they had testified at private hearings of the committee and moreover had testified at public hearings as well, no possible public interest could be served by withholding the testimony they gave on the same subject matter to which they testified to at the trial. Either they testified the same way or there was a contradiction; if they testified the same way, the prior testimony was necessarily no longer secret; if they had testified differently and they were now telling the truth, surely the committee could not rely upon such prior testimony for any purpose. If, on the other hand, prior contradictory testimony was true, what public interest could possibly be served in permitting a defendant to be convicted on perjured testimony?

Respondent finds comfort in the case of *People* v. *Walsh* (1933), 262 N. Y. 140, 150, where the court said:

> "It is conceivable, however, that the court upon inspection may find matter, the publication of which would be prejudicial to the public interest. In such case the statement would be privileged."

Respondent's counsel, citing this quotation in their brief (Resp. Br., p. 10), print the latter portion in bold type, apparently to obscure the opening phrases of the quotation. For what is important and significant in the application of the quotation to the petition at bar is precisely the opening phrases. What is said in the quotation is what petitioner has argued for on this application, namely, that *"the court upon inspection"* shall determine the privileged character of the statement. In the present situation that is precisely what did not happen,—*the court did not inspect the statements; the court did not find them to be privileged.* It was the legislative committee who attempted to determine the privileged character of the testimony and refused to permit the court to examine it, and to this interference with its proper judicial function the trial court bowed.

The cases cited by respondent on the analogy of the secrecy of grand jury minutes are equally inapplicable (Resp. Br., p. 9). In the case of *Comm.* v. *Goldberg* (1912), 212 Mass. 88, 91, the court said:

> "The defendant had no right to have the minutes of the testimony taken before the grand jury, if there were such minutes, produced for their inspection, or to read them to the jury. The ruling excepted to went no further than this."

There is no intimation here of contradictory statements having been made. As a matter of fact, the headnote of the reporter supplements the suggestion in the opinion with the statement that there had been no testimony before the grand jury.

In *Comm.* v. *Gettigan* (1925), 252 Mass. 450, 464, it appears that

> "After verdict and sentence, the defendant filed a motion to inspect the testimony and records of the grand jury for the purpose of contradicting witnesses for the Commonwealth who had testified before the grand jury."

There is nothing to show that a contradiction existed. But even if it did, when the question is raised, not for purposes of cross-examination at trial but for the first time on an application for a new trial or to reopen the case, an entirely different situation is presented than in the case at bar.

POINT II

On the issue of falsity, the petitioner was completely deprived of the right to cross-examine the prosecution's witnesses concerning their prior contradictory statements.

The respondent in its brief, by dint of adroit repetition, seeks to create the impression, first, that since the witnesses admitted they had previously denied membership in the Communist Party, both the petitioner and the jury had before them the full extent of the contradictions and there was nothing to be gained by having the transcript of testimony produced, and, second, that in any event the witnesses had been exhaustively cross-examined by petitioner's counsel as to the contradictions. Of course, respondent's counsel do not explain why an exhaustive cross-examination was necessary if the extent of the contradiction was merely denial of party membership.

Thus, both of these suggestions are joined in respondent's brief in a sort of summation (p. 13):

> "Numerous factors—that the transcripts sought were for use in cross-examining upon the collateral question of credibility; that the witnesses had already admitted,

> and the People conceded, that they had previously lied in the respect claimed; that the petitioner's attorney did cross-examine the witnesses at great length; that he exhaustively developed and harped upon the subject in question, both during cross-examination and summation * * *."

It is submitted these statements are misleading and not consonant with the facts.

The significance of the admission of the witnesses that they had previously denied membership in the Communist Party is not that at some point they had lied as to that fact. They had admitted to having been questioned at length after such denial of membership. If those questions concerned the subject matter of their testimony at the trial, as there is every reason to believe it did, then they must have told conflicting stories about a great deal of the evidence. What petitioner was deprived of, therefore, was not just the written question and answer of membership,—he was deprived of all the questions and answers on matters to which they had just testified to at the trial. It is thus not true that the "witnesses had already admitted * * * that they lied in the respect claimed". They admitted only to one fact,—the key fact to be sure,—but they were spared from being required to answer whether they had lied or told the truth as to the remainder of their material testimony. How important the full statement is, and how unsatisfactory to rest merely on the casual admission of the contradiction, is discussed in *People* v. *Schainuck* (1941), 286 N. Y. 161, 164 (cited in footnote 7, p. 21, of Pet. Br.).

Nor is it true that petitioner's attorney "exhaustively developed and harped upon the subject in question * * * during cross-examination". It is significant that although the statement is oft repeated in the brief, respondent's counsel cite *not a single reference* to the record to substantiate it. The witnesses were cross-examined, but *they were not cross-examined as to their prior contradictory statements.* It was impossible to do so. First, because not having the statements and not knowing the contents, except

for the denial of membership, petitioner's attorney could not have known what contradictions existed to predicate his questions thereon. Second, to have asked questions without the statement before him against which to check the answers would have exposed petitioner to the rule of law that he would be bound by the answers, whether true or false. Third, without the statement before him, petitioner's attorney would have been prevented from pursuing such a line of inquiry (see *People* v. *Becker* [1914], 210 N. Y. 274, 297; cited in footnote 6, p. 20, of Pet. Br.).

POINT III

The petition for a writ of certiorari should be granted.

We are firmly convinced that the petitioner was convicted without "due process of law" as guaranteed to him by the Fourteenth Amendment. We believe the facts and the arguments presented in petitioner's brief and this reply brief make that evident. He surely should be granted the opportunity of arguing the question presented in the petition before this Court. It is therefore respectfully submitted that the petition herein be granted and that a writ of certiorari be issued as prayed for.

Respectfully submitted,

JOSEPH R. BRODSKY,
Attorney for Petitioner.

November 10, 1943.